IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DENIS MCINERNEY
CAHILL GORDON & REINDEL
Attorneys for Petitioner
The Great Atlantic & Pacific Tea Company, Inc.
Office and P. O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

RAYMOND L. FALLS, JR.
WILLIAM T. LIFLAND
IRA J. DEMBROW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES: PAGE

OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), by its undersigned attorneys, respectfully petitions that a writ of certiorari issue to review the judgment and order entered in the United States Court of Appeals for the Second Circuit on June 21, 1977 (Appendix A), as to which a timely petition for rehearing was denied on August 8, 1977 (Appendix B). This petition is filed within 90 days of that date, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The opinion of the Court of Appeals (App. A) is reported at 557 F.2d 971. It affirmed an opinion of the Federal Trade Commission ("FTC" or "Commission") dated April 29, 1976, 87 F.T.C. 962, 1047-73, relevant excerpts from which are annexed as Appendix C (pp. 35a-57a).

Questions Presented

The basic issue here is whether a buyer who accepts a price offered to him on the basis of meeting competition is liable for inducing an illegal price discrimination unless he can prove, to the FTC's satisfaction under strict standards, that his seller's price was cost justified. Put in Robinson-Patman Act terms, the questions are whether the court below properly found that a buyer violates § 2(f) merely by accepting what he believes is the better of two competing offers when:

(a) the FTC held that the buyer did not act in an unfair or deceptive manner (App. C, pp. 36a-39a);

(b) there was no finding that the seller's offer was not cost justified, was not within the meeting competition defense, or was otherwise illegal (App. A, pp. 19a, 24a-25a);

(c) the buyer was admittedly "deprived" of the statutory "meeting competition" defense (App. A, pp. 17a-22a), even though the competing prices differed by only ⅓ of 1%; and

(d) the buyer was given the almost impossible burden of reconstructing his seller's costs, over six years after the event, and of proving cost justification.

Statutory Provisions

The statutes involved are §§ 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (b) and (f), and Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) ("§ 5 of the FTC Act"). These are reproduced at Appendix D, pp. 58a-60a.

Statement of the Case

The FTC's complaint was issued on October 8, 1971. It attacked a 1965 agreement between A&P and Borden, Inc. ("Borden") under which Borden began supplying "A&P" label milk and other dairy products to A&P's Chicago Unit.[1] The first two counts charged A&P alone with unfair and deceptive practices in violation of § 5 of the FTC Act and with receipt of an unlawful price discrimination in violation of § 2(f) in entering this private label arrangement. Count III charged A&P and Borden with combining to stabilize and maintain prices, contrary to § 5 of the FTC Act.

The administrative law judge dismissed Count III but found against A&P on Counts I and II. The Commission dismissed Count I, holding that A&P had not acted unfairly or deceptively in its dealings with Borden. Thus there remains only the § 2(f) charge.

As the Commission's opinion states: "Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed" (App. C, p. 35a).[2] In late 1964, A&P's national director of purchases in New York advised his subordinates (including the Chicago Division purchasing director, who in turn relayed the information to the new Chicago Unit buyer, Elmer Schmidt) that in the New York area Borden had offered A&P price reductions of about one million dollars a year if A&P

[1] This was one of 32 "Units", reporting to seven "Divisions", into which A&P had grouped its retail grocery stores; it included over 200 stores in Northern Illinois and about 35 in neighboring Northwestern Indiana.

[2] This is so despite the fact that the hearing took a monumental 110 hearing days spread over three years, apparently establishing an FTC "record" for time-consuming and expensive hearings.

switched from the Borden label to an A&P label and accepted reductions in delivery and other services. Mr. Schmidt, who was not an experienced dairy buyer, asked Borden, then A&P's dairy supplier in Chicago, for an A&P label quotation under whatever conditions would cut Borden's costs as much as possible.[3] He added that A&P wanted a price which would allow Borden a profit on this business; this was in keeping with A&P practice, one purpose of which is to assure the continued viability of suppliers.

In response, Borden submitted an August, 1965 quotation in which 11 of the 22 dairy products Borden sold to A&P in Chicago would be available under the A&P label, and delivery service would be reduced for all dairy products sold. The only price reductions, however, were on the A&P label products. Borden claimed that, at the prices it then offered, A&P could expect to realize a "saving" of some $410,000 annually on its purchases of the 11 items offered under the A&P label.[4]

---

[3] The changes made included "store-door drop delivery" and "no returns"—instead of the previous delivery into the dairy case, rotation of products there, and taking back outdated or spoiled products at Borden's expense. Products had to be "preordered" by A&P's stores well before delivery, instead of ordering from the delivery truck on its arrival. There were to be no special deliveries, no advertising or merchandising materials or allowances, and no demonstrators or special displays. Reductions in price to meet competition from other retailers are customary since the dairy usually has the risk of spoilage, but these too were eliminated. *Not one of the Borden customers allegedly discriminated against received such spartan treatment.*

[4] Borden's estimates of what A&P would "save" by accepting Borden's offers were always based on ignoring any increased costs that might result to A&P and on the three assumptions that in the Chicago area: (a) A&P would switch all of its purchases to private label, (b) A&P's sales of these products would remain as high as in the previous year ($5,600,000 on the 11 private label items), and (c) Borden's brand label prices would remain at their existing levels. As it turned out, these "savings" estimates were highly

The services Borden was eliminating were to cause A&P increased labor and other expenses which threatened to wipe out this "saving", and A&P's buyer therefore made inquiries of four other dairies. He succeeded in eliciting only one additional quotation for all of A&P's Chicago area business—from Bowman Dairy.

Because Bowman had to comply with a 1963 Robinson-Patman decree, its offer was prepared carefully (with the help of cost accountants and outside counsel) and it was prepared to make the same offer to other purchasers if it had been accepted by A&P. Bowman saw cost savings in reduced services rather than any elimination of advertising expenses, and so it offered the *same* prices for A&P label or for Bowman label, at A&P's option. Bowman's prices and terms were significantly lower than Borden's on all 22 products, and Bowman's former General Manager testified that even further price reductions would have been available to A&P if Bowman reduced its milk butterfat content and A&P preordered merchandise, since neither of these cost savings was taken into account in the Bowman offer.[5]

A&P's Unit buyer was impressed by Bowman's price. Looking only at the 11 items on which Borden's offer was stated to yield a $410,000 price reduction, he saw that the Bowman proposal would result in a $737,000 reduction.

---

inflated, in part because the last two assumptions proved contrary to fact. When A&P went to private label, Borden reduced its brand label prices to precisely those quoted in this first private label offer—thus eliminating the entire $410,000 alleged "saving" offered in August of 1965. Moreover, A&P lost sales volume when it switched to the A&P label.

[5] Bowman's offer was for milk with a 3.5% butterfat content while Borden's milk had 3.4%. It is common for dairies to remove butterfat from milk (for use in making ice cream) and to reduce the price of the milk by the recognized market value of the butterfat.

According to the Borden witnesses, Schmidt told them that Borden's offer was "not even in the ball park", "so far out of line it is not even funny", and that if Borden were to improve its offer by $50,000 per year, even that additional saving "would not be a drop in the pocket". They testified that these remarks (which were, of course, quite true) were the *only* clues they had to the competition they were facing. They did not ask either the identity of the other bidder or the prices quoted, nor did A&P volunteer this information.

The Borden negotiators believed that, in view of their long-standing relationship with A&P, they could retain A&P's business (which had been worth $1,600,000 gross profit per year to Borden) even at a slightly higher price than a competitor. They decided to double the "$410,000 saving" and to submit a new quotation showing a "saving" of $820,000 per year. Schmidt's response was: "Now you are in the ballpark". He recommended staying with Borden and told Bowman that there were "so few differences" between the two proposals that he had decided not to change suppliers.

Although there is evidence that Schmidt considered Borden's final offer more favorable than Bowman's, the two offers were at almost identical prices on the items on which Borden was reducing its prices. The specific prices for the Chicago-Calumet area for the three basic items were as follows:[6]

---

[6] Quarts, half gallons and gallons of regular homogenized milk sold in the Chicago-Calumet area alone made up most of the Chicago Unit's total dairy purchases. Moreover, these three packages accounted for substantially all of the allegedly discriminatory sales since the court below held that it had "no Robinson-Patman jurisdiction" as to products other than fluid milk (*e.g.*, cottage cheese, fortified skim milk, buttermilk, eggnog, onion dip, sour cream)

	Quarts	*Half Gallons*	*Gallons*
Original Borden Quote	$.1855	$.3430	$.6860
Bowman Quote	.1696	.3136	.6272
Final Borden Quote	.1712	.3124	.6248

Bowman was thus lower on the quart size by 1.6 mills while Borden was lower on the half gallon and gallon sizes by 0.6 of a mill a quart (or about ⅓ of 1% of the price).[7]

According to Borden's witnesses, when they delivered their final offer, they stated that it was being made to meet competition. Mr. Schmidt testified: "they used the phrase 'meeting competition' or 'beating competition' . . . [but] . . . I considered it salesmen's talk."

Borden accompanied its formal offer to A&P with a letter from Borden dated October 1, 1965, which read in full as follows:

> "You have our price quotations dated September 21, 1965 for milk, cream and other dairy products for several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.
>
> "We appreciate your patronage."

---

because these products "were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Woodstock plant" (App. A, p. 13a, fn. 7).

[7] These comparisons do not take into account the facts that Bowman (a) was offering its own brand or private label at A&P's option, (b) was offering price reductions on the entire line, and (c) would have charged an even lower price at the lower butterfat content offered by Borden, or with preordering by A&P. When these facts are considered, Bowman's offer was substantially lower than Borden's. However, because Mr. Schmidt never took these other factors into account, the Commission and the court of appeals disregarded them also.

The "meeting competition" remark was never reduced to writing, nor was it conveyed orally to anyone at A&P other than Schmidt, who did not repeat it. At no time did Borden state that the prices quoted were *not* cost justified or would *not* be offered generally.

The Borden offer and assurance letter were forwarded to A&P's New York headquarters along with a recommendation for approval from the Chicago Unit. That recommendation was accepted with the concurrence of A&P's legal department and the reduced delivery program was commenced in November, 1965.

In 1968, A&P's Chicago Unit became aware that Borden had given lower prices to Eagle Food Centers when Borden gave the few A&P stores in Eagle's area a reduction in A&P label prices to match the prices to Eagle. Thereafter, in April of 1971, A&P's Chicago Unit was offered lower prices by two other Chicago dairies (Dean Milk and Spinney Run). In February of 1972, A&P changed to those dairies and terminated Borden as a supplier in Chicago. Consequently, by the time the hearings below were commenced in 1973, Borden (which has always considered its costs highly confidential) had little incentive to help A&P reconstruct Borden's 1965 costs.[8]

[8] In 1971, a treble damage action, purportedly on behalf of a class consisting of Borden customers and tracking the Robinson-Patman charges made here, was filed in the Chicago district court. *Parker, et al.* v. *A&P and Borden,* Dkt. 71-C-3075. In that action, which is still pending, A&P had cross-claimed against Borden (for indemnification based on its assurance letter quoted above) before the FTC hearings commenced.

Reasons for Granting the Writ

This case raises the fundamental issue of the circumstances in which a buyer may accept the lowest price offered by competing sellers without incurring Robinson-Patman Act liability. This problem occurs daily in the business world, and its resolution will directly affect the extent and vigor of competitive bargaining between buyers and sellers, as well as whether large commercial buyers may continue to accept cost savings which they cannot prove because only their sellers have the information necessary to establish a cost justification defense. Even more important, the outcome will determine whether the benefits of bargaining and lower costs, in the form of lower prices, can be made available to consumers. Thus this case presents basic, important and recurring questions.

This Court has only once considered the circumstances under which a buyer may be found liable under § 2(f), and that was almost 25 years ago in *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953). The decision below stands that ruling on its head. *Automatic Canteen* held that a buyer is not liable under § 2(f) unless he knew of the price discrimination and that the seller had no "meeting competition" or "cost justification" defense (346 U.S. at 74). Here, there was no finding that Borden did not have either of these defenses, or that its prices violated § 2(a), so there was obviously no basis for any conclusion that A&P "knew" of these facts. Moreover, the precise issue in *Automatic Canteen* was whether the buyer has the burden of proving cost justification where (as here) the methods by which he is served, or the quantities in which he buys, differ from the way in which his competitors made their purchases. In such a case, this Court held it is the *Commission* which must "show that such differences could not

give rise to sufficient savings . . . to justify the price differential" (346 U.S. at 80).

The court below held that a buyer is "properly deprived" of the shelter of the "meeting competition" defense whenever the buyer accepts from a seller, who states he is attempting to meet a competitive offer, a price lower than that offer (App. A, pp. 17a-22a). Having thus summarily stripped A&P of the "meeting competition" defense, it went on to rule that the Commission need not prove that the seller violated the Act, and that the cost justification defense is not available in a § 2(f) case unless the *buyer* can prove to the Commission's satisfaction, years after the event, that the *seller's* cost savings were sufficient to justify the prices in issue. All of these key rulings, we submit, endanger the robust bargaining between buyer and seller which this Court sought to foster in the *Automatic Canteen* case. That approach was applauded by the 1955 Attorney General's National Committee to Study the Antitrust Laws as reconciling the Robinson-Patman Act with "broader antitrust policies". The Committee's report stated:

> "In markets characterized by sellers enjoying a significant degree of control over price, the exertion of offsetting force by some large and aggressive buyers bargaining for concessions can contribute materially to lower prices for all. Not only is one reduction likely to spread; but each entering wedge enhances the negotiating position of other traders who can insist on equal concessions from the supplier with the ancient gambit of buying elsewhere unless he accedes." (*Report of the Attorney General's National Committee to Study the Antitrust Laws* 196 (March 31, 1955; footnote omitted))

The entire case against A&P rested on (a) a showing that there were price differences between A&P and other Borden customers (who were admittedly served differently), (b) the outright denial of the "meeting competition" defense to A&P, on the theory that A&P waived that defense when it accepted what it believed to be the lower offer, and (c) the practical denial of the "cost justification" defense by imposing on A&P the impossible burden of reconstructing Borden's 1965 costs many years later.

This decision is not only irreconcilable with *Automatic Canteen,* it is internally inconsistent with the Commission's ruling that A&P did not deceive Borden or treat it unfairly in violation of the policy underlying § 2(f). Furthermore, it is inconsistent with the rulings of other circuit courts on the question of how rigidly the "meet but not beat" doctrine should be applied.

Unless reversed, this novel approach to a buyer's liability will result in restraining bargaining by buyers and competition among sellers—and, in consequence, higher prices to consumers. Such public mischief should not be allowed to occur without at least a review by this Court.

I.

The Decision Below Would Require Buyers to Restrict Their Bargaining Contrary to the Public Interest.

This case squarely presents the question whether a buyer can accept in silence the lower of two prices competitively offered. If the unprecedented decision below is allowed to stand, a negative answer will ultimately be imposed on all buyers subject to the Robinson-Patman Act unless they can prove cost justification. Yet in this very case, in holding that A&P had not dealt unfairly with Borden, and that

a buyer does not have any duty to disclose the amount of a competing offer, the Commission itself wrote in part:

> "The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest." (App. C, p. 38a)
>
> "We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid." (App. C, p. 39a)[9]

The Commission therefore rejected the FTC Act charge "based on the same conduct" as the § 2(f) count and similarly alleging a violation of "the policy of the Robinson-Patman Act" (App. A, p. 5a).

Whichever statute is invoked, it would seem just as "contrary to the public interest" to impose on a buyer the duty of either refusing the better offer, or advising the offeror so that he may raise his offer to his competitor's level. In either case, the practical result is lessening competition and stabilizing prices at higher levels. The FTC's ruling that acceptance of the offer in silence violates § 2(f), unless the buyer can prove cost justification, not only negates its § 5 ruling but actually requires buyers to act in a manner the FTC found to be at odds with the public interest.

The court of appeals accepted this "seeming inconsistency" because of its fear, "admittedly the rare case", that

---

[9] The Department of Justice's 1977 Report on the Robinson-Patman Act (at pp. 63-64) praised this portion of the FTC's decision as pro-competitive.

if purchasers can choose between competing bids they may induce "predatory price cutting" (App. A, p. 20a). The Commission's concern was precisely the opposite; it wrote:

> "We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution." (App. C, p. 38a)

We respectfully submit that the Commission's concerns are more realistic and more consistent with *Automatic Canteen*, where this Court stated that expansive enforcement of § 2(f) might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63). The Court stated in part:

> "putting the buyer at his peril whenever he engages in price bargaining . . . must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." (346 U.S. at 73-74, footnote omitted)

Similarly, the Department of Justice's Report on the Robinson-Patman Act, issued earlier this year, stated as to § 2f):

> "While this provision [§ 2f] was intended to counteract the power of large buyers to 'coerce' non-justified price discriminations from *smaller* sellers its applicability is general and therefore is restrictive in situations where vigorous bargaining by a buyer is neces-

sary to bring down high prices charged by large oligopolistic manufacturers.

> "It is anomalous that a statute designed to protect small businessmen has the effect of governing the competitive relationships between giant companies for the benefit of those with oligopoly selling power." (*United States Department of Justice Report on the Robinson-Patman Act* 63 (1977, emphasis in original))

It is even more anomalous that "the same conduct" which the Commission found to foster the public interest in aggressive bargaining (App. C, pp. 36a-39a) could be condemned as unlawful in the same opinion (App. C, pp. 39a, *et seq.*).

II.

The Decision Improperly Deprives Buyers of the "Meeting Competition" Defense.

The court below was fully cognizant that it did nothing less than "deprive" A&P of any "meeting competition" defense (App. A, p. 22a). It reached this result by reliance on *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), which until then had not been followed by any other court.[10] But the *Kroger* decision expressly turned on the affirmative misrepresentations of Kroger's buyer as to the existence of competitive offers (438 F.2d at 1377). Thus the *Kroger* decision is simply

[10] *Kroger* was ignored in *Rutledge* v. *Electric Hose and Rubber Co.*, 327 F. Supp. 1267, 1276 (C.D.Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975): "since plaintiffs have shown no section 2(a) violation, the [buyer] defendants have not violated § 2(f)" as well as in *Harbor Banana Distributors, Inc.* v. *FTC*, 499 F.2d 395, 399 (5th Cir. 1974): "A prohibited discrimination is a condition precedent to a finding of unlawful conduct under § 2(f)".

a ruling that a buyer may not create a meeting competition defense by intentional misrepresentations as to the existence of a competing offer. Astonishingly, the court below dismissed this distinction between a buyer's lying (in *Kroger*) and telling the truth (in this case) as "a fine one indeed" (App. A, p. 21a).

Not only is *Kroger* clearly inapposite here, but the "rare case" of the predatory buyer which the court below feared (and the *Kroger* court found) can and should be dealt with by the Commission under the more flexible standards of § 5 of the FTC Act, instead of interpreting § 2(f) so that it subjects buyers who engage in competitive shopping to treble damage exposure.

The court of appeals compounded its error by ruling that A&P could not take advantage of the "meeting competition" defense because "A&P knew *for a fact* that the final Borden bid was substantially below 'meeting competition'" (App. A, p. 19a; emphasis in original). As we have seen (p. 7 above), the price differences here were fractions of mills and no more than ⅓ of 1% of the prices Borden offered. In short, A&P could not have known "for a fact" what clearly was not a fact since Borden's offer was at best virtually equivalent to the Bowman offer.

The finding that the Borden bid was lower than Bowman's was based on the testimony of an A&P witness who said that, although "the difference was almost infinitesimal" and "a matter of mills", a comparison he received from Elmer Schmidt made the Borden bid appear to be "substantially better" (App. C, p. 42a). There was never any dispute as to the actual figures set out above or any conflict in the testimony concerning Bowman's offer.

Finally, we need not belabor the point that nothing in the statute puts the buyer in any different position than the

seller in taking advantage of the meeting competition defense of § 2(b).

III.

The Decision Below Conflicts With Other Circuit Court Decisions on "Beating Competition".

To say the least, the FTC order restricting A&P's ability to bargain for lower prices is a drastic remedy for a buyer's harboring the "evil thought" that he was accepting a substantially better offer, even though in fact it was not better. In addition, this result conflicts with the cases which have previously defined the extent of the "meet but do not beat" limitation on the "meeting competition" defense, which the court below invoked.[11]

The only other circuits to address the "meet not beat" principle have upheld the defense even as to a better offer provided that the seller was acting in good faith.[12] These decisions followed the ruling of this Court in *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945), that a seller need not show that its price only met an equally low competitive price, but merely that there was a good faith attempt to do so. Thus, if a seller can show that it acted fairly, intending only to meet a competitive price, the fact that it actually

---

[11] It seems clear that the court would have reached a different result if Borden's final quote had fortuitously exactly met the bid submitted by Bowman down to the last fraction of a mill—a result not within A&P's control and not to be expected in real life.

[12] *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 726 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Jones* v. *Borden Co.*, 430 F.2d 568 (5th Cir. 1970); *Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

"beat" the price does not result in loss of this defense.[13] Similarly, a buyer who accepts one of two such closely matched offers should be able to invoke the meeting competition defense.

IV.

This Decision Distorts This Court's Ruling in *Automatic Canteen* by Shifting the Burden of Proving Cost Justification to the Buyer and in Other Respects.

The Commission here repeatedly acknowledged that "there were differences in the way A&P and its competitors were served" which gave rise to cost savings (App. C, pp. 41a, 48a). Yet A&P lost the benefit of the seller's "cost justification" defense in § 2(a) of the Act when the FTC required strict proof on this issue by A&P in direct contravention of this Court's decision in *Automatic Canteen Co. of American* v. *FTC*, 346 U.S. 61 (1953). That case squarely stands for the proposition that where (as here) a buyer is served by different methods or buys in different quantities than his competitors, then in order to prove a § 2(f) charge the *Commission* must show lack of cost justification as well as the buyer's knowledge of that fact; it stated in part:

> "If the methods or quantities differ, the *Commission* must only show that such differences *could not* give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, *and* that the buyer, knowing these were the only differences,

---

[13] "An incidental undercutting of the prices quoted by others, when in the course of genuinely meeting one particular competitor's equally low price offer, hence should not invalidate a seller's defense." (*Report of the Attorney General's National Committee to Study the Antitrust Laws* 183 (March 31, 1955))

> should have known that they could not give rise to sufficient cost savings." (346 U.S. at 80, emphasis added)

No such showing was made here.

The decision here conflicts with *Automatic Canteen* not only in its principal holding and underlying competitive philosophy but in other respects as well. This Court started with the premise that it is "apparent that the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act. . ." (346 U.S. at 70); it continued:

> "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." (346 U.S. at 74)

This Court there advised the FTC that it had "the burden of coming forward with evidence as to costs and the buyer's knowledge thereof" (346 U.S. at 79, footnote omitted), basing that burden not only on "considerations of fairness and convenience" but on "the fact that the buyer does not have the required information, and for good reason should not be required to obtain it" (346 U.S. at 78).[14]

---

[14] The decision below recognized its departure from *Automatic Canteen* when it stated:

> "A finding of §2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification." (App. A, pp. 24a-25a)

A recent commentary on this decision states:

> "It is doubtful that this formulation comports with *Automatic Canteen*." (H. Shniderman, *Price Discrimination in Perspective* 143 (1977))

Instead of following *Automatic Canteen*, the court below ruled that it should not be read to impose any burden of proof on the FTC (App. A, pp. 25a-26a). In this, it relied on *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968). There, Meyer knew that it was purchasing on the same terms and conditions as its competitors and that it was receiving substantial and unique promotional allowances under a Meyer "coupon book" program devised by Meyer itself and not offered to other buyers. The allowances amounted to as much as one-third of the price paid by others and were not based on any cost savings. Since the methods of service and quantities of purchases did not differ between Meyer and its competitors, the ruling in *Automatic Canteen* did not require the Commission to adduce further evidence that cost justification was lacking. The FTC in *Fred Meyer* nevertheless did introduce evidence of lack of cost justification which the court of appeals found "weak but not insufficient" (359 F.2d at 365).[15]

A&P did not and could not have known Borden's costs at the time of its purchases. This was so because Borden (like sellers generally) considers its costs confidential trade secrets; moreover, Borden never commissioned a real cost study of its savings under the new method of delivery to A&P.[16]

---

[15] Among the other differences between this case and *Fred Meyer*, it should be noted, is that there was no proof here that A&P knew the prices at which Borden sold to other chain store customers. On the contrary, there was uncontradicted evidence that actual net prices to volume customers were kept secret by Borden and other dairies.

[16] At one point, the court mistakenly refers to a "Borden cost study . . . criticized by A&P" (App. A, pp. 28a-29a). There was no Borden cost study, and none was submitted by the Commission (App. C, p. 51a, fn. 25; App. A, p. 24a). The administrative law judge who presided at the hearing did make an effort to satisfy

A&P did subpoena certain Borden records and employed cost accountants to make cost studies when the complaint issued (over 6 years after the challenged events) and even during the hearings. Although these studies showed substantial cost justification, the FTC rejected them—in part because they were not based on "contemporaneous" observations by accountants familiar with Borden's procedures. This, of course, is an impossible standard for a buyer to meet and is the predictable result of placing the burden of showing cost justification—whether it is described as one of introducing evidence or one of persuasion—on the party least likely to be able to discharge it.

This Court so recognized in *Automatic Canteen* when it specifically referred to the cost justification defense and stated: "Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer" (346 U.S. at 79). Instead, the FTC delayed six years before issuing this complaint, the hearings were not concluded until 10 years after the events in issue, and yet at no time did the Commission attempt to develop any cost data.

Automatic Canteen's requirements by ruling that certain data prepared by a Borden accountant showed a lack of cost justification. However, the Commission, as noted by the court of appeals, "did not consider those figures as a formal cost study . . ." (App. A, pp. 24a-25a, fn. 11) and refused to credit this data as being accurate.

CONCLUSION

The decision here is fundamentally at odds with the robust bargaining which this Court, in *Automatic Canteen,* perceived as preferable to any mechanistic interpretation of the Robinson-Patman Act. It is also inconsistent with the public interest considerations to which the FTC gave lip service in this same decision, with decisions of other circuit courts, and with the interests of consumers and others in a competitive economy. Accordingly, we respectfully request that this Court issue a writ of certiorari to review the decision below.

Dated: New York, New York
November 7, 1977

Respectfully submitted,

DENIS MCINERNEY
CAHILL GORDON & REINDEL
Attorneys for Petitioner
The Great Atlantic & Pacific
Tea Company, Inc.
Office and P. O. Address:
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

RAYMOND L. FALLS, JR.
WILLIAM T. LIFLAND
IRA J. DEMBROW

Appendices

APPENDIX A

Opinion of the Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 922—September Term, 1976.

(Argued March 24, 1977 Decided June 21, 1977.)

Docket No. 76-4179

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

ANDERSON and MESKILL, *Circuit Judges,* and MARKEY, *Chief Judge,* U. S. Court of Customs and Patent Appeals.*

Petition by The Great Atlantic & Pacific Tea Company, Inc., for review of an order of the Federal Trade Commission, based on its determination that petitioner had violated §2(f) of the Robinson-Patman Act (15 U.S.C. §13(f)).

Petition denied and enforcement granted.

* Sitting by designation.

Appendix A—Opinion of the Court

ANDERSON, *Circuit Judge:*

This is a petition for review of an order of the Federal Trade Commission (FTC or the Commission) in the matter of *The Great Atlantic & Pacific Tea Co., Inc.*, —— F.T.C. —— [1973-76 Transfer Binder] CCH Trade Reg. Rep. ¶21,150 (1976) (hereinafter cited as *A & P*). The Commission found that A & P violated §2(f) of the Robinson-Patman Act, as amended, 15 U.S.C. §13(f)[1] by knowingly

---

[1] 15 U.S.C. §13(f) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

15 U.S.C. §§13(a) and (b), provide in pertinent part:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. *Provided, however*, That nothing herein contained

inducing or receiving illegal price discriminations from The Borden Company (Borden) in the purchase of "private label" milk in the Chicago area from 1965 through 1972. We deny the petition.

Now in its seventh year of litigation, this case has developed a voluminous record and thorough arguments and briefs by both sides. The Commission has succinctly set out the underlying facts in its extensive opinion, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,039-40. The case arose from A & P's attempt in the mid-1960's to secure savings in its dairy products business by switching from selling "brand label" milk in its stores (*e.g.*, milk sold under the brand name of the supplying dairy) to selling "private label" milk (*e.g.* milk sold under the A & P label). Pursuant to directions from A & P's headquarters in New York, A & P's "Chicago Unit," [2] made up of over 200 A & P stores in northern Illinois, plus about 35 in neighboring portions of northwestern Indiana and a few stores in Iowa, began negotiations with Borden for the supply of A & P private label milk and other dairy products. In August of 1965, Borden submitted a bid, premised on A & P's acceptance of limited delivery service, which Borden claimed would have reduced A & P's annual dairy costs by $410,000. Not content with this offer, A & P sought and received a lower bid from a competing dairy, Bowman Dairy (Bowman).

---

shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

[2] A & P states in its Brief in this appeal that its Chicago Unit was one of 32 similar "Units" reporting to seven "Divisions," into which A & P had grouped its over 4,000 retail grocery stores.

Armed with a lower bid, A & P turned its attention back to Borden (contrary to its usual practice, which is to allow only one bid from a supplier, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,039). Elmer Schmidt, A & P's Chicago Unit buyer, telephoned Borden's Chicago chain store sales manager, Gordon Tarr, and told him that Borden's initial offer was not "in the ball park." Pressed for details as to what would be "in the ball park," Schmidt told Tarr that a $50,000 improvement "would not be a drop in the pocket." Borden then had to decide whether to re-bid. At the time, A & P was one of Borden's major customers in the Chicago area. In addition, Borden had just invested over five million dollars in a new dairy processing facility in Woodstock, Illinois; losing the A & P account would have confronted Borden with the inefficient use of the new plant. Ralph Minkler, President of Borden's Chicago Central District, testified before the Administrative Law Judge that he was told by his superiors to "save the [A & P] business." Accordingly, Borden offered to double A & P's expected annual savings under a private label program to $820,000. Minkler emphasized to A & P's Schmidt at the time this second bid was offered that it was being made only to meet the rival Bowman bid and that Borden knew "of no other way to justify this." Before accepting the second and final Borden bid, A & P's Schmidt requested a letter from Borden to the effect that the prices being offered A & P were proportionally available to others. Borden's "availability letter" stated only that it felt its prices were proper under applicable law and that it was prepared to defend them.

The second Borden bid was then reviewed by Herschel Smith, A & P's National Director of Purchases in New York. Smith testified that at the time, he regarded the

second Borden bid as "substantially better" than the Bowman bid. As for Borden's "availability letter," Smith testified that he did not initially understand Borden's letter to mean that other Borden customers could enjoy proportionally lower prices such as those agreed upon with A & P, but that after consultation with a Mr. Archer (who had no recollection of such a discussion) he became convinced that Borden's letter was one of availability for all customers. After review by A & P's legal department, the second and final Borden bid was accepted by A & P. Borden began serving A & P in the Chicago area with private label dairy products in November of 1965.

The above constitute the factual nucleus of the three-count complaint filed against A & P in 1971. Count I charged A & P with misleading Borden in the course of negotiations for the private label contract, in that A & P allegedly failed to inform Borden that its second and final bid had not merely "met", but substantially "beaten," Bowman's competitive bid. Such conduct by A & P was said to constitute a violation of §5 of the Federal Trade Commission Act, 15 U.S.C. §45, along with the policy of the Robinson-Patman Act, 15 U.S.C. §13. Count II, based on the same conduct by A & P, charged a violation of §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f)[3] (knowing inducement or reception by A & P of price discriminations from Borden which are in turn prohibited by §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a)). Finally, Count III charged a combination of A & P and Borden to stabilize and maintain the retail and wholesale prices of milk and other dairy products, contrary to §5 of the Federal Trade Commission Act, 15 U.S.C. §45.

---

[3] Quoted in note 1, *supra*.

Following an extended discovery period and hearing, the latter extending over 110 days, the Administrative Law Judge found that as to Count I, A & P "ha[d] acted unfairly and deceptively" in accepting a price offer from Borden offered to meet competition from Bowman Dairy, "when in fact such [a] meeting-competition-defense[4] was not available and without informing Borden of this fact in violation of the policy of Section 2 of the amended Clayton Act [the Robinson-Patman Act] and in violation of Section 5 of the Federal Trade Commission Act." Likewise as to Count II, A & P was found to have violated §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), in knowingly inducing or receiving price discriminations in the purchase of fluid milk and other dairy products. As to Count III, however, which had charged a combination to stabilize and maintain milk prices between A & P and Borden, the Administrative Law Judge held that the FTC had not satisfied its burden of proof. Accordingly, Count III was dismissed.

On review by the Commission, the Administrative Law Judge's holding as to Count I, grounded on A & P's alleged deceptive practices in bargaining with Borden, was reversed. The Commission characterized the charge as "directed to the question of what must legally be disclosed during contract negotiations." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,040. That is, knowing that Borden's final bid was substantially better than Bowman's bid and also knowing that Borden would defend the legality of its bid, if necessary, on the ground that it was merely attempting to meet, but not beat, a competitor's bid from Bowman

[4] The "meeting competition" defense to a charge of price discrimination, as incorporated in 15 U.S.C. §13(b), quoted at note 1, *supra*, is available to both buyers and sellers when charged with violations of the Robinson-Patman Act, 15 U.S.C. §13.

Dairy, A & P refrained from affirmatively disclosing to Borden the terms of Bowman's bid and accepted the Borden offer. The Commission did not agree with the Administrative Law Judge that such behavior constituted an unfair trade practice under the Federal Trade Commission Act, 15 U.S.C. §45, primarily because such a holding would be "contrary to normal business practice and, we think, contrary to the public interest." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,040.

In spite of the above holding as to Count I, the Commission nonetheless affirmed the finding of A & P's liability under §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), ruling that (1) the sales by Borden to A & P had met the statute's jurisdictional requirements that at least one purchase said to involve price discriminations "in commerce"; (2) that the evidence demonstrated the presence of price discriminations, which resulted in competitive injury, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,042-43; and (3) by virtue of its trade experience and common sense, A & P "knew or should have known that it was the beneficiary of a price discrimination having the requisite harmful competitive effects." Id. at ——, ¶21,150 at 21,043.

A & P had interposed two defenses to this charge of illegal price discrimination, the first of which was that it was protected from §2(f) liability through 15 U.S.C. §13(b),[5] which allows a *seller* charged with giving illegally discriminatory prices to rebutt a *prima facie* case by showing that the lower price afforded a purchaser was "made in good faith to meet an equally low price of a competitor." The Supreme Court has ruled in *Automatic Canteen* v.

[5] Quoted in note 1, *supra*.

FTC, 346 U.S. 61, 74 (1953), that a buyer charged under §2(f) is not liable if the prices he induces are either within the "meeting competition" defense of the seller or not known by the buyer not to be within one of those defenses. A & P argued that the final Borden bid had been submitted by Borden in a good faith effort to meet an equally low price of a competitor (here, Bowman Dairy) and A & P was therefore unaware that Borden's bid could not be protected by the seller's "meeting competition" defense. That is, transferring Borden's potential "meeting competition" defense to A & P, the purchaser could not be held liable. Following *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), however, the Commission ruled that:

> "[W]hen a buyer is charged with violating Section 2(f) [15 U.S.C. §13(f)], the price he induces must come within the meeting competition defense not only from the seller's point of view but also from the buyer's." *A & P*, —— F.T.C. at —— , ¶21,150 at 21,043.

The mere fact that had Borden been charged with giving illegal price discriminations under §2(a) (which it was not), it *could* have defended on the ground that its final bid was merely a good faith effort to meet what it believed to be Bowman's competitive bid, was not sufficient in the Commission's view, to absolve A & P of any wrongdoing, because A & P was aware of the price terms of *both* Borden's and Bowman's bids and had concluded in 1965 that Borden had substantially beaten its competitor. Also pursuant to its application of *Kroger, supra*, the Commission further ruled against A & P's contentions that it could not be charged with knowingly inducing or re-

ceiving illegal price discriminations under §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), unless Borden had been found to have given such illegal prices under §2(a) of the same Act, 15 U.S.C. §13(a). *A & P,* —— F.T.C. at ——, ¶21,150 at 21,044.

A & P's second defense was grounded on §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a),[6] which exonerates sellers who give discriminatory prices on goods of like grade and quality if the discriminations are justified by the seller's manufacture, sale or delivery cost savings in servicing one purchaser over another. Much like the "meeting competition" defense, the purchaser may defend here on the alternative grounds that the discriminatory prices induced or received were in fact "cost justified" or that the buyer was unaware of the unavailability of that defense to the seller. *Automatic Canteen, supra,* 346 U.S. at 74; Rowe, *Price Discrimination under the Robinson-Patman Act,* §14.7 at 438 (1962) (hereinafter cited as *Rowe*). Likewise here, A & P was unsuccessful in establishing its "cost justification" defense. The cost study presented by A & P to show the actual cost justification of Borden's prices was found " 'so defective and inadequate as to furnish no evidentiary basis' to justify the price differential that A & P received for private label products on the basis of Borden's cost savings . . . . " *A & P,* —— F.T.C. at ——, ¶21,150 at 21,047-48. As for A & P's knowledge that Borden could not justify its prices, the Commission found that FTC counsel had more than met their "initial burden" of showing such knowledge. This conclusion was buttressed by the facts that Borden had submitted its final offer solely on the basis that it was meeting competition, which put A & P on notice of the probable absence of a Borden cost

[6] Quoted in pertinent part in note 1, *supra.*

justification defense, Borden's failure to furnish A & P with a clear "letter of availability" (stating that A & P's competitors could enjoy the same prices on a proportional basis), Borden's submission of cost data during the negotiations showing that it would either lose money or make a minimal profit on "private label" sales to A & P, as well as A & P's trade experience. Further, the Commission noted that after Borden had begun servicing A & P with both private label and Borden-label dairy products, Borden had tried to increase prices on its products to cover rising container, labor and social security costs. While accepting price increases on Borden-label products, A & P had initially refused a commensurate increase on private label prices, and notwithstanding the fact that the products were of like grade and quality and that Borden's costs for private and brand label dairy products were virtually the same. *A & P*, —— F.T.C. at ——, ¶21,150 at 21,046-47. In short, A & P's "meeting competition" and "cost justification" defenses failed and it was found to have violated §2(f) of the Robinson-Patman Act.

As for the third charge against A & P, combining with Borden to stabilize dairy prices, the Administrative Law Judge's dismissal of the count was affirmed by the Commission, because the evidence presented simply did not support the charge that "A & P ever gave Borden the assurance that A & P would not create a price differential at the retail level." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,049.

Finally, A & P's claim that it was denied due process of law by the Commission's delay in initiating the proceedings was dismissed on the grounds that any delays were reasonably related to the complexity of the case and to A & P's own failure to evince any concern for a speedy

resolution of the matter. The substantive remedy imposed by the Commission was the nationwide distribution of the Commission's order to its milk and dairy products suppliers as well as placing the burden of going forward with a meeting-competition defense in the future on A & P. A & P unsuccessfully challenged the nationwide scope of the distribution order.

On this appeal, then, the sole remaining issue for our consideration is the Commission's holding that A & P violated §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), by knowingly inducing or receiving illegally discriminatory prices from Borden. We first take up briefly A & P's jurisdictional objection, as well as the evidentiary basis for the Commission's conclusion, and then move on to the heart of this appeal, A & P's contention that the FTC misapplied the law with respect to its defenses of "meeting competition" and "cost justification".

A & P's jurisdictional challenge rests on the point that the Robinson-Patman Act prohibits illegal price discriminations only "where either or any of the purchasers involved in such discrimination are *in commerce* . . . ." 15 U.S.C. §13(a) (emphasis added), and upon A & P's assertion that Borden, in the circumstances of this case, was not in interstate commerce. This language has been interpreted recently in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186 (1974), to require *more* than a showing that the allegedly anticompetitive activities "affect commerce" as is the case with an action under §1 of the Sherman Act, 15 U.S.C. §1. 419 U.S. at 195. *See, Rowe,* §4.9 at 78, *et seq.* In *Gulf Oil, supra,* a private antitrust action including Robinson-Patman charges against various *sellers* of liquid asphalt, the Court ruled that the alleged illegally discriminatory sales must have occurred in the course of the

seller's interstate activities and that at least one of the sales which, when compared with another, gave rise to a price discrimination, must have been made in interstate commerce. 419 U.S. at 195. Applying this test to the situation at hand, where a *buyer* has been charged with inducing or receiving illegally discriminatory prices, the Robinson-Patman Act may be invoked where at least one of the purchases by a buyer engaged in interstate activities, which gave rise to the allegedly illegal price discrimination, was in interstate commerce. In this case, A & P's "Chicago Unit" bought brand and private label milk from Borden for individual A & P stores in both Illinois and Indiana. "[S]ubstantially all of the private label milk sold to A & P came from Borden's Woodstock, Illinois, processing plant. The plant, in turn, acquired approximately 60% of its milk from Wisconsin dairy farmers. *A & P*, —— F.T.C. at ——, ¶21,150 at 21,042. While there is no doubt, then, that A & P milk purchases for the chain's Indiana stores were "in commerce" for Robinson-Patman purposes, the only remaining question is whether the Illinois-based stores' purchases from Borden were interstate transactions as well. The Commission concluded that they were, inasmuch as Borden acquired most of its milk from Wisconsin and the raw milk was not substantially altered, chemically or otherwise, by processing at the Woodstock plant. We agree. Much as in *Foremost Dairies* v. *FTC*, 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965), a prior price discrimination action also involving fluid milk, the milk here passed "in a steady flow from the farms in . . . [Wisconsin] through the . . . [Woodstock, Illinois] processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery es-

tablishments in . . . [the Chicago area]." 348 F.2d at 677 (footnote omitted.) Accordingly, A & P's milk purchases from Borden in both Illinois and Indiana were "in commerce" for purposes of Robinson-Patman Act jurisdiction,[7] which is thus plainly established.

The next issue is whether the Commission made out a *prima facie* violation of §2(f), 15 U.S.C. §13(f), by showing the knowing inducement or reception by A & P of illegal price discriminations "where the effect of such discrimination[s] may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." 15 U.S.C. §13(a). The Commission must show *both, i.e.,* that the prices received by A & P from Borden were lower than its competitors and that A & P knew that the prices it received violated §2(a), the provision prohibiting the giving of discriminatory prices by sellers. *American Motor Specialties* v. *FTC,* 278 F.2d 225, 228 (2d Cir.), *cert. denied,*

---

[7] A & P's argument that as to products other than fluid milk (*i.e.,* cottage cheese, fortified skim milk, buttermilk, eggnog, onion dip and sour cream) supplied by Borden under the private A & P label, there was no Robinson-Patman jurisdiction is well-based and correct. These products were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Woodstock plant. *See, i.e., Red Apple Supermarkets, Inc.* v. *Deltown Foods, Inc.,* 419 F. Supp. 1256 (S.D.N.Y. 1976) (New York producer of Light 'n' Lively Milk, which involves blending dried, non-fat milk solids with raw, whole milk and liquid skim milk, cannot be charged with illegal price discrimination under §2(a) of the Robinson-Patman Act based on the fact that some of the raw, whole milk used in the production of Light 'n' Lively originated on Pennsylvania farms); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.,* 287 F.2d 265 (7th Cir.), *cert. denied,* 368 U.S. 829 (1961) (butterfat used in the manufacture of ice cream, originating in Wisconsin, not sufficient basis to support §2(a) jurisdiction where ice cream was both manufactured and sold in Illinois.)

364 U.S. 884 (1960).[8] In *Automatic Canteen, supra,* the court laid stress on the knowledge requirement of §2(f) proceedings, holding:

> "If the requirement of knowledge in §2(f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense from the seller, nevertheless proceeded to exert pressure for lower prices." 346 U.S. at 79.

In reviewing this phase of the case, we are limited by the statutory directive that "[t]he findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. §21(c). Put another way, "[t]he appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts." *FTC* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746, 760 (1945); *FTC* v. *Algoma Lumber Co.,* 291 U.S. 67, 73 (1934); *Foremost Dairies* v. *FTC, supra; Callaghan & Co.* v. *FTC,* 163 F.2d 359, 372 (2d Cir. 1947). Looking, then, at only some of the evidence presented by the Commission, it is clear that a *prima facie* case of illegal price discriminations knowingly induced or received by a buyer was made out. The Administrative Law Judge's thorough initial decision in this case set out the higher prices paid by A & P's competitors for milk substantially identical to that purchased by A & P under the private label agreement

---

[8] A similar formulation of the §2(f) *prima facie* case is as follows:

> "Thus, the buyer's prima facie violation arises upon proof that the discriminatory concession in his favor was sizable enough to create competitive injury, and that furthermore the nature of the discrimination placed him on notice of its probable illegality." (Emphasis in original.) Rowe, *Price Discrimination under The Robinson-Patman Act,* §14.7, at 438 (1962).

in the Gary-Hammond and Valparaiso areas of Indiana, resulting in price discriminations ranging from 22.5 per cent to 5.9 per cent.

The conclusion that these substantial discriminations were injurious to competition is supported by A & P's admission that fluid milk is one of the most important commodities carried in retail grocery stores and that milk products are "sometimes used as price leaders which are tagged below the normal market price to draw customers to a store where it is hoped the customer will purchase additional products . . . ." A & P also admitted that profit margins have been "notoriously low" in the retail grocery business. Putting these three factors together, the Administrative Law Judge concluded that if A & P's competitors had received the larger discounts obtained by A & P through the private label agreement, they would have increased their net profits and could have been more competitive with A & P. It is, therefore, clear that there was substantial evidence presented to show a " 'reasonable possibility'," *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 50 (1948); or probability, *Foremost Dairies, Inc.* v. *FTC*, 348 F.2d 674, 680-81 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), of adverse effects on competition.

Turning to the "knowledge" requirement of §2(f), the Administrative Law Judge was guided by *Automatic Canteen's, supra*, requirement that, to make out a *prima facie* case, the Commission must initially show only that A & P knew that the methods by which it was served and the quantities in which it purchased were the same as in the case of its competitors, or, if the methods or quantities differ, "The Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price dif-

ferential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings." 346 U.S. at 80. The purpose of making such a showing is to demonstrate that the discriminatory prices induced or received by the buyer were not justified by lower costs to the seller and were thus prohibited by §2(a) of the Robinson-Patman Act. The evidence here showed that A & P was purchasing Borden-label milk at the same prices charged to its competitors, that A & P was no novice in the dairy industry and had discussed pricing patterns in the Chicago area with Borden officials (facts which went towards showing the buyer's "trade experience" referred to in *Automatic Canteen, supra,* 346 U.S. at 79-80) and that Borden had informed A & P upon making its final and winning bid that it could not justify its prices on other than a "meeting competition" basis. This last statement, ruled the Administrative Law Judge, placed on A & P "the duty to inquire to determine whether its prices were legal," citing *Fred Meyer, Inc.* v. *FTC,* 359 F.2d 351, 365-66 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968). In addition, there was evidence that Borden had provided A & P with cost data during the private label negotiations showing that Borden would incur losses or gain no more than minimal profits on the private label agreement. Further, A & P had resisted cost increases on both Borden label and A & P label milk, after the initiation of the private label service, finally accepting increases on Borden-label milk and proportionately smaller ones on A & P label milk, even though A & P stores were serviced in exactly the same way as to both private label and Borden-label milk. In short, the evidence as to A & P's knowledge that Borden could not cost justify its prices was plainly substantial and may not be disturbed on this petition for review.

Faced with a *prima facie* case of §2(f) liability, however, the buyer may rebut the charge by resorting to statutory defenses available to sellers. The major defenses are that the lower prices offered were "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor," 15 U.S.C. §13(b), (the "meeting competition" defense) and that the lower prices made "only due allowance" for cost differences to the seller in servicing a particular customer, 15 U.S.C. §13(a) (the "cost justification" defense). In addition, and primarily to give substance to §2(f)'s requirement that only those illegal prices knowingly induced or received by a buyer can form the basis of buyer liability, the Supreme Court ruled in *Automatic Canteen, supra:*

> "We therefore conclude that a buyer is not liable under §2(f) if the lower prices he induces are *either* within one of the seller's defenses such as the cost justification *or* not known by him not to be within one of those defenses." 346 U.S. at 74. (Emphasis added.)

A & P defended its behavior below by invoking both the "meeting competition" and "cost justification" defenses. As to the first of these we agree with the Commission that A & P could not assert the "meeting competition" defense because in 1965, at the time of the private label negotiations, A & P concluded that Borden's bid was " 'substantially better' " or lower than Bowman's, *A & P,* —— F.T.C. at ——, —— ¶21,150 at 21,044. A & P also argued that a 1973 comparison of the Borden bid with the Bowman bid disclosed Borden's to be higher. The Commission concluded, however, on the basis of substantial evidence, that Bowman's bid was in fact higher than Borden's. *A & P.* —— F.T.C. at ——, ¶21,150 at 21,044. Knowing, therefore,

that Borden's final bid not only met, but substantially bettered Bowman's, A & P accepted the prices in question. The Commission's holding and rationale were to a large extent grounded on *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), another §2(f) proceeding against a retail grocery chain in which the buyer gave false price information to a seller during negotiations for private label milk service, thereby inducing illegal price discriminations. The seller, Beatrice Foods, was absolved of wrongdoing by the Commission because it was in fact responding in good faith to what it believed to be, but which in fact was not, a competitive bid, *Beatrice Foods*, 76 F.T.C. 719 (1969). The buyer, Kroger Co., however, did not escape liability. The Sixth Circuit ruled that Beatrice's absolution from §2(a) liability did not *ipso facto* exonerate Kroger because *Automatic Canteen, supra*, did not warrant such a result and "[t]o hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices." 438 F.2d at 1377. The court went on to rule:

> "In order for the buyer to be sheltered through the exoneration of the seller under Section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer." *Id.*

In support of its petition for review, A & P first argues that under *Automatic Canteen, supra*, it was entitled to a "meeting competition" defense because it had every reason to believe that had Borden been charged with knowingly giving illegally discriminatory prices (it was not, pursuant to the Commission's discretion, *see FTC* v. *Universal-*

Rundle Corp., 387 U.S. 244, 251 (1967)), it could have successfully pled its good faith effort to meet Bowman's allegedly competitive bid. We do not agree. While Borden may well have been *under the impression* that the terms of its final offer merely met the Bowman bid, A & P knew *for a fact* that the final Borden bid was substantially below "meeting competition" and beat the Bowman bid by a good margin. As A & P itself recognizes, the Supreme Court in *Automatic Canteen* interpreted Congress' intent in enacting §2(f) as seeking to reach those buyers who, knowing full well of the little likelihood of a defense for the seller, "nevertheless proceeded to exert pressure for lower prices." 346 U.S. at 79. A & P became one of the buyers Congress was concerned with, when it pressured Borden into a second bid which in fact went beyond the bounds of "meeting competition" and went a long way below it. In short, the Sixth Circuit's rule in *Kroger* that where, in a §2(f) proceeding, the buyer interposes a "meeting competition" defense, the facts must be viewed from the point of view of the buyer as well as that of the seller, is consistent with *Automatic Canteen's supra*, maxim that buyers may induce or receive prices, which sellers can *in fact* offer, consistent with the Robinson-Patman Act. 346 U.S. at 70-71. Here, Borden's final bid was not *in fact* sheltered by the "meeting competition" defense. *See*, Curtis, *Buyer Liability under The Robinson-Patman Act*, 42 ABA Antitrust L.J. 345, 351-2 (1973).

Indeed, to rule otherwise would emasculate *Automatic Canteen, supra*, and the purpose of §2(f) in that large buyers could consistently play one seller off against another to the point where all bids are below sellers' costs and then in reliance upon the sellers' potential good faith and its "meeting competition" defenses, thus vindicate the final

price. Such tactics would ultimately result in the acquisition of increased, and perhaps overwhelming, market power by the large buyer, all to the ultimate competitive detriment of the buyer's competitors. In addition, toleration of such abusive behavior by buyers would, in most cases, favor the largest seller, the ones most able to bear the losses resulting from such a competitive situation, with the further result of ultimate anticompetitive effects among sellers. *See generally, Rowe, supra,* §2.1 at 28. That is, in the situation where the seller is unaware of what the buyer is doing (admittedly the rare case), the seller would, in effect, be engaging in predatory price cutting without his knowledge. While the seller may legally escape §2(a) liability in such a situation because of an assumed "meeting competition" defense, adopting A & P's argument in this case would not be, in the final analysis, in the public interest. As noted by the Supreme Court in *Utah Pie Co.* v. *Continental Baking,* 386 U.S. 685 (1967), a suit under §§1 and 2 of the Sherman Act and §2(a) of the Robinson-Patman Act, "the [Robinson-Patman] Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact." 386 U.S. at 703.

A & P's views regarding the buyer's use of a "meeting competition" defense contrast sharply with the legislative origins of the defense under §2 of the Clayton Act of 1914. Congress was concerned on the one hand with the seller's ability to defend himself against local competition without having to cut prices in all areas where it did business, and on the other with the position of a seller trying to enter a new territory by cutting prices only locally. H. Rep. No. 627, 63rd Cong., 2d Sess., pt. 2, at 2-3 (1914); *Rowe, supra,* §9.1 at 208-9.

A & P goes on to argue, however, that even if we find *Kroger, supra,* persuasive, it should not be followed in this case, because the Kroger Co. had been found to be a "lying buyer" in its negotiations with Beatrice, while in the present controversy, A & P has been exonerated under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, for its behavior during negotiations with Borden. This argument is extended to include the assertion that it is simply inconsistent for the Commission to exonerate A & P from charges of unfair trade practices and still hold it liable for a §2(f) violation. The net effect of this resolution, argues A & P, would be nonetheless to require buyers in the future affirmatively to disclose to a bidder that its bid had not only met, but substantially beaten, that of a competitor. Such a result would allegedly run counter to the public interest in vigorous and competitive price bargaining.

Again we reject these superficially attractive arguments. While *Kroger* did indeed involve a "lying buyer," we do not regard the Sixth Circuit's ruling as strictly limited to the situation where the charged buyer affirmatively lied to the seller. The rule that the "meeting competition" defense must be looked at from the buyer's perspective where the buyer is charged under §2(f) is a salutory and correct one, whether the buyer lies or merely keeps quiet about the nature of the competing bid it has already been offered, for the policy reasons stated *supra.* Further, the line between affirmative misrepresentation, as in *Kroger,* and the present case, where Borden was told it was not "in the ballpark" and that a $50,000 reduction would not be a "drop in the pocket", is a fine one indeed. *Kroger* is, therefore, relevant to the present controversy and its sound reasoning must be applied here.

The seeming inconsistency between a finding of §2(f) liability and exoneration under a charge of unfair trade practices is, in turn, more apparent than real. One commentator recently opined with regard to this very case that "Section 5 [of the Federal Trade Commission Act, 15 U.S.C. §45] should not be used for reaching instances of price discrimination which are covered (either explicitly included or excluded) by the Robinson-Patman Act." Reeves, *Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation,* 16 B.C. Ind. & Comm. L. Rev. 151, 198 (1975).[9] That is, where a §2(f) violation can be made out by sufficient competent evidence, there is neither need nor reason to invoke the Federal Trade Commission Act. While we express no opinion as to when and under what circumstances the Commission may or may not charge a violation of the Federal Trade Commission Act,[10] the point here is that A & P's liability under §2(f) must be independently assessed without regard to any other statute, so that a finding that A & P has not engaged in unfair trade practices does not, *ipso facto,* absolve A & P under §2(f).

We hold that in this case and under these circumstances, the Commission properly deprived A & P of Borden's potential "meeting competition" defense.

Turning then to the "cost justification" defense, it is now settled that a buyer charged under §2(f) may defend

---

[9] The Reeves article discusses only the FTC's complaint in the present case and was published prior to the Administrative Law Judge's initial decision in the case.

[10] For an excellent analysis and summary of past and present FTC practice under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, see Rice, *Consumer Transactions,* Ch. 8 (1975).

on the alternative grounds that the prices induced or received were in fact cost justified to the seller or that the buyer did not know or could not reasonably have known that the prices were not cost justified to the seller. *Automatic Canteen, supra,* 346 U.S. at 74. A & P attempted to defend on the first ground of the "cost justification" defense through three cost studies, which purported to show that Borden's final offer was within its costs. The methodology and underlying bases of these studies were analyzed at length by the Administrative Law Judge, who concluded that:

> "A & P's cost justification studies . . . are so defective and inadequate as to furnish no evidentiary basis for justifying A & P's preferential price for private label items on the basis of Borden's savings in cost."

The above conclusion was adopted by the Commission, *A & P,* —— FTC at ——, ¶21,150 at 21,047-48. The A & P studies were flawed in a variety of respects, many of which were attributable to the preparer's unfamiliarity with Borden's operations in the Chicago area. For example, as to delivery costs, the largest single expense item after the direct material costs of dairy products, the Administrative Law Judge excluded A & P's studies because they were originally based on wholesale milk delivery time standards prepared by the management consulting firm of Case & Co., and the underlying data supporting the conclusions reached on these studies was not produced. Further, the computation of Borden's processing costs at its Woodstock, Illinois facility was likewise flawed; instead of computing those costs directly, A & P's cost analyst first determined "unit cost" at Borden's two Wisconsin dairies and then

multiplied by the number of units produced at the Woodstock plant to arrive at total Woodstock cost, assuming Wisconsin unit costs. The final figure was adjusted to reflect the fact that the Woodstock plant had higher labor costs but lower non-labor costs than the Wisconsin plants. The Commission agreed with the Administrative Law Judge that such a roundabout method of cost computation was not "reliable."

A & P nonetheless argues that the Commission acted improperly in rejecting its cost studies, in that they were made in good faith and in accordance with sound accounting principles, entitling them to "a very great weight." *Minneapolis-Honeywell Regulatory Co.*, 44 F.T.C. 351, 394 (1948). While it is, of course, true that a cost study will not be invalidated merely because one method of computation was used over another, *FTC* v. *Standard Motor Products Inc.*, 371 F.2d 613, 622 (2d Cir. 1967), for to do so would be to place unfair strictures on the party preparing the cost study where one method of computation is as fair and accurate as the next, the problems with the instant studies are that they were at some points internally inconsistent and at others simply inaccurate, *A & P*, —— F.T.C. at ——, ¶21,150 at 21,048. The net result of A & P's efforts could not, therefore, be relied on.

Thus, A & P was unsuccessful in showing that Borden's final prices for private label milk were cost justified in fact, the first ground of the "cost justification" defense. On the other hand, the Commission did not itself submit a cost study to show the absence of cost justification.[11] A

[11] The only other evidentiary material as regards cost justification was the Borden figures disclosed by Joseph Malone, which indicated that Borden would either lose money or make minimal profits on the A & P private label arrangement. The Commission did not

finding of §2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification. This seemingly anomalous situation is naturally seized upon by A & P, which argues that the Commission's decision "stand[s] *Automatic Canteen* on its head" by assuming that the FTC "can show that the buyer was 'reasonably aware' that the prices were not cost justified without showing that they were in fact, not cost justified." Our reading of *Automatic Canteen, supra,* does not, however, support the proposition that the Commission must, in all cases, show as part of its *prima facie* case that the prices induced or received by the buyer were not in fact cost justified.

In *Automatic Canteen, supra,* the Court rejected the FTC's contention that a *prima facie* case of §2(f) liability was made out where price differentials were shown and where the buyer knew "only that the prices are lower than those offered other buyers." 346 at 71. In giving content to the §2(f) requirement that the prices induced or received by the buyer must be knowingly in violation of §2(a), however, the Court refrained from the opposite, and equally extreme, position, namely that the Commission must always prove the absence of cost justification in fact. Charting, instead, a middle course based both on

---

consider those figures as a formal cost study, however, *A & P,* —— F.T.C. at ——, n. 25, ¶21,150 at 21,046 n. 25, and took them into account only as they served to demonstrate A & P's knowledge of the probability of a lack of cost justification: "Although the [Malone] data may not be completely accurate, it demonstrates that A & P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A & P should have inquired whether the prices were available to others. See *Fred Meyer, Inc.* v. *FTC, supra,* 359 F.2d at 365-67." *A & P,* —— F.T.C. at ——, ¶21,150 at 21,046. (Footnote omitted.)

the statutory requirement of knowledge and on the difficulties of proof as regards cost justification, 346 U.S. at 79, the Court required the FTC henceforth to go forward with some evidence that the buyer knew that the discriminatory prices it was receiving could not be cost justified, including but not limited to, the buyer's trade experience in a particular situation. 346 U.S. at 79-80. See Galanti, *Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms, and Promotional Allowances: Caveat Emptor in the 1970's,* 7 Ind. L. Rev. 962, 989-90 (1974). Consistent with its view that "[e]nforcement of the provisions of §2(f) against such a buyer should not be difficult," 346 U.S. at 79, however, the Court made no mention of a requirement that the FTC show the absence of cost justification in fact through its own cost study.

This is not the first time that an argument similar to A & P's has been advanced. In *Fred Meyer, Inc.* v. *FTC,* 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968), the Commission's first §2(f) proceeding against an individual buyer since *Automatic Canteen, supra;* Note, *The Evolving Duty of an Innocent Buyer to Inquire into His Bargain under Section 2(F) of The Robinson-Patman Act,* 49 Ind. L.J. 348, 357 (1974), an operator of a chain of 13 retail supermarkets was charged under §2(f) as a result of a promotional scheme which involved a "coupon book." Each coupon entitled the purchaser to a price reduction on a particular product. Advertisers in the book paid a flat fee per coupon page and otherwise underwrote the promotion by volume-based reductions, replacing goods sold or redeeming coupons in cash at an agreed rate. 359 F.2d at 356. The Ninth Circuit ruled that in showing the buyer's knowledge that the price differentials resulting from the coupon promotion

could not be cost justified, the FTC had carried its burden by adducing evidence that none of the sellers involved granted quantity discounts, that Meyer itself paid the "going price" of the goods during the 11 months of the year in which there was no promotion and that during the non-promotion months, Meyer paid the same price for the goods as did its competitors. In addition,

> "[t]hat the Commission did not prove the costs of the suppliers is immaterial. Costs surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least when the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer 'is not *an unsuspecting recipient* of prohibited discriminations,' *Automatic Canteen,* 346 U.S. at 81, 73 S. Ct. at 1028. (Emphasis added.)" 359 F.2d at 364.

The above considerations are directly relevant to the present case, where the Commission showed, through substantial evidence (as summarized, *supra*) that A & P knew or reasonably should have known that the final price concessions it received from Borden were not cost justified. To here require the Commission to submit a formal cost study or other cost-measuring analysis, in addition to the testimony and other evidence it has already adduced, would go far towards foreclosing the possibility of a §2(f) proceeding even where all significant indications and factors point to the absence of cost justification and the likelihood of illegal price discriminations. Our result is, therefore,

consistent with *Automatic Canteen's* concern with the "balance of convenience" in going forward with evidence in §2(f) cases, 346 U.S. at 74, as well as with the public interest in the enforcement of §2(f).

Having failed in showing actual cost justification, A & P was thus reduced to defending the §2(f) charge through a showing that it did not know, nor had any reason to know, that Borden's prices could not be cost justified. We have already ruled that the Commission established a *prima facie* showing of A & P's knowledge that the prices in question were *not* cost justified, consistent with its burden of proof on the issue, *Beatrice Foods Co., supra,* 76 F.T.C. at 820; *Suburban Propane Gas Corp.,* 73 F.T.C. 1269, 1274-75 (1968), and thus may be brief in discussing A & P's arguments on this appeal. As set out in the Commission's opinion, A & P's major evidentiary rebuttals to the FTC's *prima facie* showing of knowledge were first, that Borden's letter to A & P after the conclusion of the private label negotiations in which Borden asserted that its prices were "proper under applicable law" and that it was prepared to defend them, was interpreted by A & P to mean that other supermarkets could enjoy the same low prices offered to A & P on a proportionately equal basis. The Commission concluded, however, that the Borden letter did not constitute the "customary assurances" of proportional price availability which led to the reasonable inferences that the prices were not generally available and not cost justified, *A & P,* —— F.T.C. at —— , ¶21,150 at 21,046. Such reasonable inferences may not be disturbed on appeal, *FTC* v. *A. E. Staley Manufacturing Co., supra,* 324 U.S. at 760. Secondly, the Borden cost study prepared at the time of the private label negotiations and submitted to A & P, which purported to show losses or minimal profits

by Borden as a result of private label service, was criticized by A & P as not "completely reliable," *A & P*, —— F.T.C. at ——, ¶21,150 at 21,047. Again, while one view of this Borden study is that it was "salesman's talk," designed to impress A & P with the bargain it was being offered, an equally reasonable view, given that A & P did not contemporaneously criticize the study, is that A & P knew as well as Borden of the illegality of the bargain. Thirdly, in evaluating the reasonableness of Borden's bid, A & P's Smith used a "2-2-2 formula," which reflects the general proposition that "a dairy can profitably sell milk for approximately six cents more per quart than the dairy's cost for raw milk." [12] *A & P*, —— F.T.C. at —— , ¶21,150 at 21,047 (footnote omitted). The Commission concluded that while the use of the formula was relevant to the issue of knowledge, it did not fully rebut the FTC's *prima facie* showing of knowledge.

As to the Commission's *prima facie* showing, A & P makes a variety of arguments, the thrust of which is that the evidence submitted as probative of A & P's knowledge of illegal price discriminations could be easily explained as resulting from quite different factors and motivations. By way of example, the Commission found that after the commencement of private label service in 1975, Borden charged A & P two different prices for private label and Borden-label dairy products, even though, except for a small amount devoted to advertising Borden-label products, there was "no difference in the cost to Borden of private and branded products." *A & P*, —— F.T.C. at ——, ¶21,150 at 21,047. From these facts, among others, the Commission inferred that A & P knew that any differences

[12] Two cents each are allocated for cartons, plant costs and profits, and delivery costs.

in service were not cost justified. A & P now argues that "[t]he mere fact that Borden's prices to A & P for branded milk (delivered under similar conditions) were higher than for private label should perhaps have made A & P suspicious that the brand label prices were too high, rather than the private label prices were too low." Such an argument essentially invites us to retry the facts and draw new inferences in this case, which we may not do. *FTC* v. *A. E. Staley Manufacturing Co., supra,* 324 U.S. at 760. A & P's evidentiary and legal arguments as to the "cost justification" defense in support of its petition for review are unpersuasive.

We come to the last ground of the petition, namely that the Commission's final order was unnecessary and unduly broad. The order provided that in the future, A & P bear the burden of going forward with the "meeting competition" defense and also decreed the nationwide distribution of the order to A & P's operating divisions, as well as its suppliers of milk and other dairy products. Our scope of review is here limited by the principles that Congress has placed the primary responsibility for fashioning orders upon the Commission, *FTC* v. *National Lead Co.,* 352 U.S. 419, 429 (1957), and that the courts should not "lightly modify" the Commission's orders, *FTC* v. *Cement Institute,* 333 U.S. 683, 726 (1948). *See also, FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965); *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1401-2 (2d Cir.), *cert. denied,* —— U.S. —— (1976). In addition the Commission has been consistently granted "wide discretion" in choosing a remedy "deemed adequate to cope with the unlawful practices" involved. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946); *FTC* v. *Mandel Bros.,* 359 U.S. 385, 392 (1959); *Fedders Corp.* v. *FTC, supra,* 529 F.2d at 1401.

With the above in mind, we first take up A & P's argument that the order was in any event unnecessary because A & P voluntarily terminated its private label arrangement with Borden in February of 1972, four months after the issuance of the complaint in this proceeding and over five years ago to date. While it may be true that a long delay in the proceedings, accompanied by significant changes in the market upon which the Commission's order will act, may be sufficient to warrant the remand of a case to the Commission for further evidence as to the present structure of the relevant market, *Columbia Broadcasting System, Inc.* v. *FTC,* 414 F.2d 974, 981-82 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970), the Commission here found that "[t]he dairy and retail food industries have not drastically changed in the last few years." *A & P,* —— F.T.C. at ——, ¶21,150 at 21,052. Further, in *Fedders Corp.* v. *FTC, supra,* a proceeding under §5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a), resulting from advertising misrepresentations, the petitioner had discontinued the unlawful activities *prior* to the filing of the Commission's complaint and had given written assurances that it would not resume them. Nonetheless, this court ruled that these factors would not bar a cease-and-desist order "where the public interest otherwise requires it. *Diener's Inc.* v. *FTC,* 161 U.S.App. D. C. 213, 494, F.2d 1132, 1133 (1974) (per curiam); *Cotherman* v. *FTC,* 417 F.2d 587, 595 (5th Cir. 1969); *Libby-Owens-Ford Glass Co.* v. *FTC,* 352 F.2d 415, 418 (6th Cir. 1965)." 529 F.2d at 1403. Here, of course, the A & P-Borden private label arrangement was abandoned only *after* the filing of the FTC complaint, while the lengthy time span between the filing of the complaint and our review is, in large part, attributable to the complexity of the case as well as the

inability of both parties to move this matter along. More important, milk continues to be a major product line for supermarkets while private label milk is commonly carried on the shelves of large supermarkets. As a result, it is clearly in the public interest to enforce the Commission's order.

As to the nationwide scope of the order, A & P argues that the evidence did not show that any A & P officer or employee at the division level or above was "guilty" of even the innocuous conduct alleged in the complaint, so that the order should be limited to A & P's "Chicago Unit." The fact remains, however, that the private label program was initiated by A & P's national headquarters in New York, and A & P's national director of purchases had a direct hand in accepting the final Borden bid here in question. In light of these factors, we cannot say that the Commission abused its "wide discretion," *Jacob Siegel Co.* v. *FTC, supra,* 327 U.S. at 611, in decreeing the nationwide distribution of the order.

It is also urged that the Commission's order providing that henceforth, A & P must carry the burden of going forward with a "meeting competition" defense is improper in that it shifts the burden of proof from the Commission to the petitioner. By its very terms, however, the order does not affect the burden of proof but only the burden of going forward, a distinction highlighted in *Automatic Canteen, supra. See, Rowe, supra,* §14.7 at 441. In a §2(f) proceeding, the Commission must continue to carry the burden of proving the knowing inducement or receipt of illegally discriminatory prices.

The petition for review is hereby denied, and enforcement of the order is granted.

APPENDIX B

Order on Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of August, one thousand nine hundred and seventy-seven.

Present:

HON. THOMAS J. MESKILL,
HON. ROBERT P. ANDERSON,
Circuit Judges,

HON. HOWARD T. MARKEY,
U.S. Customs & Patent Appeals Judge;

Docket No. 76-4179

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

THE FEDERAL TRADE COMMISSION,
Respondent.

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

by /s/ SARA PIOVIA,
Deputy Clerk

Appendix B—Order on Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of August, one thousand nine hundred and seventy-seven.

76-4179

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

THE FEDERAL TRADE COMMISSION,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN
Chief Judge

APPENDIX C

Opinion of the Commission

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
Stephen Nye

DOCKET No. 8866

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a corporation, and BORDEN, INC., a corporation.

By NYE, *Commissioner:*

* * *

I. FACTUAL BACKGROUND

Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed. All of the violations alleged in this action concern the events surrounding a November 1, 1965 agreement between A&P and Borden * * *

Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy (CX 50) that was lower than Borden's August 13 offer (*See* CX 65A; A&P's Proposed Findings

at 121-122).[2] On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, "I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." (Tr. 873). Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a $50,000 improvement in Borden's bid "would not be a drop in the pocket." (Tr. 874-875; *see* CX 53A-B). Contrary to its usual practice, A&P then offered Borden the opportunity to submit another bid (Tr. 1248-1249, 1892-1893).

* * *

II. Count I: Failing to Inform

Count I charged that A&P violated Section 5 of the F.T.C. Act as well as the policy of Section 2 of the Robinson-Patman Act by misleading Borden during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The thrust of the charge is that A&P failed to inform Borden that Borden's offer, made in an attempt to meet a competitive bid received by A&P from another potential supplier, was substantially lower than that of the only other bidder. The count is directed to the question of what must legally be disclosed during contract negotiations.

We briefly state the relevant facts. A&P compared the Bowman bid with Borden's and concluded that Borden's bid was [6] substantially lower. Also, A&P knew that Borden was relying on the meeting competition defense (Tr. 248, 886, 1789, 1792, 1801). Finally, A&P accepted Borden's

---

[2] Contrary to Judge Hinkes' conclusion (I.D. 103, 106-07, 114), we find that the Bowman bid was operative and could be compared to the Borden offer.

bid without telling Borden that Borden substantially "beat" Bowman's bid as it clearly had (Tr. 1413; CX 71, 263; *see* Answer at 42). Because A&P did not then inform Borden that the meeting competition defense was unavailable, Judge Hinkes concluded that A&P engaged in an "unfair" practice that violated Section 5 of the F.T.C. Act (I.D. 115, 116).[5]

At the outset we emphasize our belief that Section 5 of the F.T.C. Act can reach actions that violate the policy of the Robinson-Patman Act, *cf. FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), and, further, that Section 5 should be used to fill the gap in coverage caused by the manner in which Congress added the buyer liability provision contained in Section 2(f) of the Robinson-Patman Act.[6] It is well established that Section 5 can reach buyers who induce violations of the promotional allowance and payment for services provisions of the Robinson-Patman Act. *Fred Meyer, Inc.* v. *FTC*, 359 [7] F.2d 351, 367 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968); *Giant Food Inc.* v. *FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *Grand Union Co.* v. *FTC*, 300 F.2d 92, 98-99 (2d Cir. 1962). According to the Court in *Grand Union*, the application of Section 5 to buyers who violate specific provisions of the Robinson-Patman Act neither offends Congressional policies nor circumvents the criteria of illegality prescribed by the Robinson-Patman

---

[5] Although A&P made certain misrepresentations, *see* note 3, *supra*, such misrepresentations are not relevant to the charge.

[6] "Although Robinson-Patman Act prohibitions were predominantly directed at discriminatory concessions coerced by powerful buyers, the legislative process relegated Section 2(f) to a minor role * * * Section 2(f) first emerged as an amendment offered in debate on the floor of the Senate * * * and represented a last minute afterthought addition." Att'y Gen.'s Nat'l Comm. to Study the Antitrust Laws, Report 193 (1955) (hereinafter "Report").

Act. *Id.* at 98. In addition, it is appropriate to use Section 5 to fence in activities which, if permitted to mature, could violate the antitrust laws, including the Robinson-Patman Act, or which otherwise violate the policy of the antitrust laws. *Id.* at 99.

Having recognized this, however, and having measured A&P's conduct against these standards, we do not think that a violation of Section 5 has occurred here. The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest. As the Court in *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965), stated in describing normal practice:

> The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place.

[8] We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution. As the Attorney General's National Committee to Study the Antitrust Laws stated, "Legalistic impediments to the normal bargaining process * * * might well deprive the public of gains that under effective competition it has a right to expect." Report, *supra* note 6, at

196. We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid. We do not believe that the failure of buyers to engage in such disclosure should violate the F.T.C. Act.[7] Therefore, Count I should be dismissed. [9]

III. Count II: Knowingly Inducing or Receiving Discriminations in Price

Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving discriminations in the price of milk and other dairy products from Borden, which discriminations are prohibited by Section 2(a) of that Act.[8]

---

[7] We are not concluding that nondisclosure during commercial bargaining never rises to a Section 5 offense. We simply hold that it should not be A&P's responsibility to tell Borden whether a legal defense is available. As discussed at p. 20 n. 19, a seller's good faith meeting competition defense under the Robinson-Patman Act is dependent on some factors that are more readily available to him than to the buyer. For example, to have a meeting competition defense, the seller who has knowingly discriminated in price must show that he acted prudently in surmising whether his bid, in fact, met the equally low price of a competitor. *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945); *Viviano Macaroni Co.* v. *FTC*, 411 F.2d 255, 257-58 (3d Cir. 1969).

[8] Section 2(f) reads:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 2(a) reads in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly,

Section 2(f) was enacted to make the prohibitions of price discrimination applicable to buyers. *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 70 (1953). In order to [10] prove a violation of Section 2(f), complaint counsel must not only establish all elements of a Section 2(a) violation, but must also meet special requirements with respect to showing the respondent's "knowledge." Further, the buyer is entitled to raise any defenses that the seller might have raised, specifically those listed in Sections 2(a) and 2(b).[9]

A&P admits that the A&P-Borden transaction contained many of the elements of a Section 2(a) offense. It argues, however, that the sales in Illinois were not "in commerce" and that A&P did not receive a discriminatory price that caused competitive injury. In addition, A&P asserts that complaint counsel failed to establish (1) that the price quoted by Borden was not made to meet a competitive bid and was not cost justified and (2) that A&P knew that the price received was not covered by one of those defenses.

We find that A&P has violated Section 2(f) and reject its proffered arguments.

* * *

---

to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition * * * or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

[9] Section 2(b) reads in pertinent part:

* * * nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *.

We agree with Judge Hinkes' findings (I.D. 62-88; 118-123) that the relevant comparisons demonstrate the existence of discriminations in price. We note that a price comparison does not have to include the full line of dairy products nor A&P's purchases of Borden brand products. We faced and dismissed this same argument in *Beatrice Foods Co.*, 76 F.T.C. 719, 806 (1969), *aff'd sub nom., Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). Specifically, the price of private label milk and other dairy products sold to A&P may validly be compared with Borden's sales of such items to other groceries to ascertain whether [14] discrimination took place. The *Kroger* Court stressed "the competitive advantage which results when disadvantaged competitors are denied a [private] label which the favored buyer receives." 438 F.2d at 1379. In addition, although there were differences in the way A&P and its competitors were served, the distinctions were often minimal and, in any event, are more properly considered in connection with the cost justification defense.

* * *

c. *Meeting Competition*

A seller who has discriminated in price is guiltless under the Robinson-Patman Act if the lower price was offered in good faith to meet an equally low price of a competitor. 15 U.S.C. § 13(b). The Supreme Court has stated that the buyer is not liable under Section 2(f) if the lower price he induces is within the meeting competition defense or if the buyer is unaware that the price cannot be protected by that defense. *Automatic Canteen Co.* v. *FTC, supra*, 346 U.S. at 74. The Court in *Kroger Co.* v. *FTC, supra*, 438 F.2d at 1377, noted that when a buyer is charged with violating Section 2(f), the price he induces must come within

the meeting competition defense not only from the seller's point of view but also from the buyer's. This is consistent with the Supreme Court's statement concerning the burden of going forward in a Section 2(f) case:

> [18] Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller. *Automatic Canteen* v. *FTC, supra,* 346 U.S. at 79 n. 23.

Specifically, proof that the seller did not act in good faith is unnecessary to a finding that a buyer cannot assert the meeting competition defense.

In its reply brief, A&P argues that its contemporaneous comparison of the Bowman and the last Borden bid is not relevant (Reply at 35). We disagree. The comparisons demonstrate whether A&P acted in good faith. For example, if the Borden bid *"beat"* the Bowman bid yet A&P contemporaneously reasonably believed that it only *met* the bid, we believe A&P (as well as Borden, if Borden prudently reached the same conclusion) could assert the meeting competition defense. *See FTC* v. *A.E. Staley Mfg. Co.,* 324 U.S. 746, 759-60 (1945).[16] However, we conclude that A&P contemporaneously concluded that Borden's bid was "substantially better" than Bowman's (Tr. 1413-1414, 1896-1897; CX 263), and A&P, therefore, cannot assert the seller's meeting competition defense.

---

[16] A&P argued that in this case, it contemporaneously believed that Borden's bid beat Bowman's but after "properly" comparing the bids, Bowman's bid, in fact, beat Borden's (Appeal at 31-33).

We assume, *arguendo,* that A&P can assert the defense if the Borden bid did, in fact, happen only to meet the Bowman bid. [19] However, while we believe that the Bowman bid was comparable and operative,[17] we conclude that the Borden bid was substantially better than the Bowman bid. Specifically, we find that prior to adjusting the Bowman bid to make it reflect such items as A&P's true volume requirements and delivery requirements, Borden's bid substantially beat Bowman's (*See* CX 263B; Compare CX 75 F-J with CX 50). In addition, after adjusting the Bowman bid to make it responsive to A&P's true situation, Borden's bid beats Bowman's by an even greater amount. Bowman would not be able to give A&P such a low price because A&P's volume was less than the $1 million per month stipulated in the Bowman offer (*See* citations in I.D. 106) and because Bowman would have to increase the days of delivery in the Gary-Hammond area (*See* citations in I.D. 107).[18]

Finally, A&P argues that because Borden has not been found in violation of Section 2(a), A&P cannot be charged under Section 2(f). In other words, A&P asserts that Borden must be convicted of a Section 2(a) violation prior to or at the same time as A&P is found in violation of Section 2(f). In developing this argument, A&P claims that complaint counsel's case against A&P is premised on Borden's having a valid meeting [20] competition defense, and that therefore, Borden would be absolved from any Section 2(a) charge. We reject the argument.

---

[17] Specifically, we reverse Judge Hinkes' conclusion to the contrary (*See* FF 103, 106-07, 114).

[18] The difference in stipulated butterfat content would not greatly change the difference in prices. Contrary to A&P's study, Borden's butterfat level was probably about 3.45 percent (Tr. 5513), and the Bowman bid may not have called for 3.5 percent (Tr. 5450-5453, 5461, 6187-6188; *see* I.D. 129).

Appendix C—Opinion of the Commission

The Commission alone establishes the enforcement policy which will best accomplish the ends contemplated by Congress. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *See Jewel Companies, Inc.* v. *FTC*, 432.F.2d 1155, 1160 (7th Cir. 1970). In deciding to issue a complaint against A&P charging a violation of Section 2(f), the Commission concluded that A&P's conduct was egregious enough to warrant such action. It did not follow that the Commission condones Borden's behavior. In addition, as complaint counsel notes (Answer at 50), A&P was the "principal malefactor" in the negotiations with Borden. It placed the pressure on Borden, not *vice versa*. Although the Commission decided not to issue a complaint against Borden for violation of Section 2(a), the Commission has not concluded that Borden would have a valid meeting competition defense to such a charge.[19]

[21] Furthermore, even though a seller has a defense to a Robinson-Patman Act charge, a buyer can still violate Section 2(f). The court in *Kroger Co.* v. *FTC*, *supra*, found

---

[19] Judge Hinkes did not reach the question of whether Borden had a meeting competition defense (*see* I.D. 166). We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition defense, the record must demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. *FTC* v. *A. E. Staley Mfg. Co.*, *supra*, 324 U.S. at 759-760; *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir. 1973). As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs (Tr. 237-239, 376-77, 878, 961-62). It should have asked A&P for more information about the competing bid. By not making the request, it was not acting prudently. *See Standard Oil Co.* v. *Brown*, 238 F.2d 54, 58 (5th Cir. 1956); F. Rowe, Price Discrimination under the Robinson-Patman Act 226 (1962). As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs (Tr. 213-214, 872-873, 955).

that the buyer lied to the seller about the details of a competing bid, 438 F.2d at 1375-1376, and that the seller had no way of knowing that the buyer had lied. Therefore, in submitting the second bid, the seller had a meeting competition defense within the meaning of Section 2(b). However, this defense did not exonerate the buyer who knew that the bid was, in fact, not within the defense. "To hold otherwise * * * would put a premium on the buyer's artifice and cunning in inducing discriminatory prices [and] would violate the purposes of the Act, and frustrate the intent of the Congress." *Id.* at 1377.

d. *Cost Justification*

A seller who charges different prices is exonerated if the differences are justified by a savings in cost. 15 U.S.C. § 13(a). As in the case of meeting competition, a buyer is not liable under Section 2(f) if the lower price he induces is within the cost justification defense or if the buyer is unaware that the price is not protected by that defense.

[22] The parties and Judge Hinkes disagree as to who has the burden of proof in demonstrating whether the cost justification defense is available (I.D. 134; Answer at 66-68; Reply at 48-49). A&P and Judge Hinkes are mistaken in concluding that the *Automatic Canteen* case dealt with the burden of proof issue. Rather, the Supreme Court stated twice that it was deciding only who had the burden of first coming forward with probative evidence. 346 U.S. at 65, 82. In promulgating its rule of "fairness and convenience," *id.* at 78, the Court determined that the Commission did not satisfy this burden by showing only that the buyer had knowledge of a price differential.[20] Rather, the

[20] In *Automatic Canteen,* the Commission only established that the buyer had obtained prices as much as one-third below its competitors.

Commission must present evidence to demonstrate that the buyer was reasonably aware that the price differential could not be cost justified. *Id.*, at 78-80.

The Court believed, however, that the burden of showing this knowledge "should not be difficult." *Id.* at 79. As an example of the evidence which would satisfy this burden in a situation where methods of services and quantities delivered differ, the Court held that the Commission "must only show" that the differences could not give rise to sufficient cost savings and that the buyer, knowing that these were the only differences, should have known that the differences were not [23] cost justified. *Id.* at 80. The Court emphasized that it would not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified," *id.* at 80, concluding that the Commission should do this.[21] *Id.* at 80-81; *accord, Suburban Propane Gas Corp.*, 73 F.T.C. 1269, 1272-1274 (1968) (interlocutory order); 16D J. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation §§ 36.05[2]-36.05[3] (1971).

We have described on several occasions how complaint counsel can successfully meet the burden of going forward with the evidence where a favored buyer purchases in quantities or under methods differing from those accorded to disfavored buyers:

> [I]f complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in

[21] The Commission has frequently decided what circumstances demonstrate that a buyer had the requisite knowledge. *E.g., Mid-South Distributors* v. *FTC*, 287 F.2d 512, 518-19 n. 15 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961).

> the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden. *Beatrice Foods Co., supra,* 76 F.T.C. at 820, *quoting Suburban Propane Gas Corp.,* 71 F.T.C. 1695, 1699 n. 2 (1967) (interlocutory order).

We reiterate what we said in *Suburban Propane Gas Corp., supra,* 73 F.T.C. at 1273—the burden of establishing a *prima facie* case or first going forward with the evidence may [24] be satisfied without introducing a formal cost study showing that the lower prices were not, in fact, cost justified. The Court of Appeals for the Sixth Circuit has affirmed our use of this rule. *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378.

Once complaint counsel has satisfied their initial burden, the buyer must demonstrate that it did not know or could not reasonably have known that the price differential was not cost justified. If it fails to prove lack of knowledge, it must show that the price differential was, in fact, cost justified. *See Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74. Therefore, if the buyer establishes that it neither had nor should be charged with such knowledge, the buyer does not have to submit any cost justification study. However, if the buyer cannot establish the requisite lack of knowledge, it must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers. In other words, it is possible for the buyer to be unable to respond adequately to complaint counsel's evidence demonstrating knowledge yet be able to demonstrate that, in fact, the price differential was cost justified. Unlike the meeting compe-

tition defense, one does not need to demonstrate good faith in proving cost justification. Therefore, it is completely permissible to receive in evidence cost studies prepared after the alleged discriminatory sale and only for purposes of litigation. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act,* 59 Colum. L. Rev. 584, 610 (1959).

[25] Finally, if the buyer satisfies the burden of meeting complaint counsel's *prima facie* case, then complaint counsel must rebut the buyer's evidence. The buyer may then introduce other evidence responding to complaint counsel. Although the burden of going forward may shift back and forth during the hearing and is frequently not so easily segregated, the burden of persuasion as to the issue of whether the buyer had the requisite knowledge that the cost justification defense is unavailable rests with complaint counsel while the burden of persuasion as to the issue of whether the prices are, in fact, cost justified rests with the buyer. *Suburban Propane Gas Corp., supra,* 73 F.T.C. at 1274-1275; *see Beatrice Foods Co., supra,* 76 F.T.C. at 820.

We believe that the evidence submitted by complaint counsel in this case well exceeded its initial burden. Many competitors were charged a much higher price than A&P for Borden's milk products even though they bought in greater quantities than the individual A&P stores with which they were competing (*E.g.*, Burger's: CX 182, 187, 188A, RX 234, p. 19; Tr. 2270, 2381, 2385). Although many of these stores received more service than A&P, the service savings to Borden could not in any way justify the price differentials (*See* I.D. 109-110). In addition, even those companies that received limited service paid a higher price than A&P (*See* Complaint Counsel's Proposed Findings, Vol. 1 at 150-151), a price differential that was not justified

by the saving of such costs as advertising (*See* CX 54; Tr. 3387, 3430, 6136). A&P knew about the differentials, since it was being charged the "regular" price for branded items (*See* CX 75, 255; RX 66). [26] This evidence in itself would probably be sufficient to shift the burden of going forward. However, complaint counsel introduced much more evidence to demonstrate that A&P knew or should have known that the prices it received were not cost justified.

First, Borden stated explicitly that its final offer could *only* be justified on the basis of meeting competition, and A&P accepted the offer on this representation (Tr. 248, 886, 1789, 1792).[22] As the Supreme Court stated in *Automatic Canteen Co.* v. *FTC, supra,* 346 at U.S. 73: "§ 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Accord,* 80 Cong. Rec. 9419 (1936) (Statement of Congressman Utterback in presenting conference report to House); Report, *supra* note 6, at 193. The Borden statement put A&P on notice that it was likely that Borden did not have a cost justification defense. *Cf. Beatrice Foods Co., supra,* 76 F.T.C. at 821 (because seller was told by two other dairies that price might not be cost justified, he had notice of possible cost justification problems).

[27] Second, although A&P requested the customary assurances from Borden that Borden's discounts were avail-

---

[22] When Ralph Minkler, President of Borden's Central District, presented Borden's final bid to A&P's Schmidt, he stated: "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis." (Tr. 248).

able to others on proportionately equal terms (Tr. 1783, 1786-1788, 1978-1979), A&P did not receive them. In fact, Borden specifically refused to comply, writing instead, "our prices are proper under applicable law and we are prepared to defend these prices." (CX 263H; *see* Tr. 1406, 1428, 1438-1440).[23]

Third, Borden provided A&P with detailed cost data during the course of the negotiations, data which showed that Borden would be either losing money or making a minimal profit (CX 23, 24, 25A, 26; Tr. 201-205, 1866-1869). Although the data may not be completely accurate, it demonstrates that A&P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A&P should have inquired whether the prices were available to others. *See Fred Meyer, Inc.* v. *FTC, supra,* 359 F.2d at 365-67.[24] Of course, if the A&P-Borden contract was profitable for Borden before the [28] switch to limited service and Borden would lose money after the change, then

---

[23] Herschel Smith, A&P's Headquarter's Dairy Buyer, said that he received oral assurances from Harry Archer, Borden's Executive Vice President in New York, that this was a letter of availability (Tr. 1407). However, Archer denied having such a conversation (Tr. 1246-1247). After viewing both witnesses and examining all of the evidence, Judge Hinkes did not credit Smith's testimony (I.D. 96).

[24] Citing *Automatic Canteen Co.* v. *FTC's* language about puffing in a bargaining situation, 346 U.S. at 80 n. 24, A&P argues that Borden might very well have submitted a purposely inaccurate bid (Appeal at 45-47). At this point, A&P's evaluation of Joseph Malone, the Vice President of Governmental Controls and formerly the Comptroller of Borden's Central District and the employee who prepared the data, is relevant: A&P believed that Malone was "honest and forthright." (Tr. 1843). In addition, if we disregarded all studies in which a self-interest motive is present, then, of course, we must dismiss the studies prepared for A&P's cost justification defense.

A&P should have doubted whether the new prices could be cost justified (*See* I.D. 91-93).[25]

Fourth, A&P's trade experience should have given it reason to know that Borden's private label prices were not cost justified. *See Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 79-80 (Trade experience "can afford a sufficient degree of knowledge to provide a basis for prosecution."); *Kroger Co.* v. *FTC, supra,* 438 F.2d at 1378. As Judge Hinkes concluded (I.D. 97, 98, 127), A&P was familiar with the dairy industry generally and with the Chicago area specifically. Also, A&P knew that Borden's private label price was substantially lower than its branded label price because A&P bought both types of milk from Borden (*See* CX 75, 255; RX 66). Therefore, A&P should have known that its competitors, some of whom received limited service, were paying much more than A&P for the same product.[26]

Finally, A&P's conduct after the private label agreement was consummated convinces us that A&P knew or had reason to [29] know that any differences in service were not cost justified. First, in mid-November of 1965, Borden decreased the price A&P paid for Borden label products but at a much lower discount than it granted A&P on private label products (RX 66). Except for the small amount devoted to advertising, there was no difference in the cost to Borden of private and branded products. Therefore, A&P should have realized that the price was not cost jus-

---

[25] As noted at pages 23-24, we do not believe that complaint counsel has the burden of introducing a formal study demonstrating that the price differential is not cost justified and do not consider these calculations such a study.

[26] Of course, labels do not differentiate products for purposes of determining "like grade and quality." *FTC* v. *Borden Co.*, 383 U.S. 637, 640 (1966). The only benefit lost by A&P was advertising, which was a very small expense.

tified (*see* I.D. 99). Second, in May of 1966, A&P accepted an increase on Borden label products which reflected increased container, labor, and social security costs, an increase which Borden apparently charged all of its purchasers. However, A&P at first refused Borden's request that the price of A&P's private label products be raised commensurately (CX 79, 81, 255B; Tr. 1050-1054) and later accepted only a proportionately smaller increase (Tr. 1056-1062; *See* CX 102, 103, 105, 106, 110).[27] Because A&P readily accepted the increases on branded milk, we infer that A&P believed that Borden was selling branded milk to some of A&P's competitors at delivery terms similar to those at which Borden was selling branded and unbranded milk to A&P, and therefore, considering Borden's small advertising expenses, A&P's private label discount was not cost justified. *See Automatic Canteen Co.* v. *FTC*, *supra*, 346 U.S. at 80.

[30] In conclusion, viewing all of these facts together, we find that complaint counsel fully established a *prima facie* case that A&P knew or should have known that the prices Borden charged it for private label products was not cost justified.[28] The burden then shifted to A&P to

---

[27] This action is conceivably a second inducement by A&P of discriminatory prices and therefore, a separate and distinct violation of the Robinson-Patman Act (*See* I.D. 57, 58, 89, 101; Complaint Counsel's Proposed Findings, Vol. I at 119). Because we have found that A&P received an illegal price preference prior to these increases, we do not specifically address this claim.

[28] We are not convinced that because Borden spread the savings over eleven rather than thirteen items, A&P was on notice that the bid was not cost justified. Although generally we agree that "the same cost savings applicable to different products with different volumes would not likely be related to * * * cost savings" (I.D. 90), it is at least conceivable that the $820,000 savings represented the amount Borden would save by switching to limited delivery service.

demonstrate that it did not have knowledge that the prices it received were not cost justified or, failing to establish that, that the prices were, in fact, cost justified.

We do not find persuasive A&P's assertions that it did not know nor should have known that the prices it received were not cost justified. Its statements concerning the meeting competition language in the negotiations and the "legal letter" are not convincing (*see* A&P's Proposed Findings at 76-86). In a post-hoc analysis of the cost data that Borden supplied it, A&P argued that the Borden study was not completely reliable (Appeal at 45-47). However, A&P did not show whether it had contemporaneous criticisms of the quality of the data nor whether it communicated any of its criticisms, perhaps in the form of additional inquiries, to Borden. As noted at page 27, this data does not have to be completely accurate [31] but is useful in proving that A&P was on notice that the new contract could be unprofitable to Borden. Finally, A&P's post-agreement behavior is relevant to show what knowledge A&P had at the time the agreement was entered.

A&P introduced evidence which showed that A&P's Smith used a "2-2-2 formula" to evaluate the reasonableness of a bid. The formula states that a dairy can profitably sell milk for approximately six cents more per quart than the dairy's cost for raw milk.[29] Although we agree that this formula is relevant in considering whether A&P had knowledge, it does not rebut complaint counsel's *prima facie* case. As noted, the formula was simply a reference point from which to estimate costs (Tr. 6399). It was developed from A&P's experience in negotiating for its private label supply of milk in New York and Massachusetts. Because

[29] Two cents each are allocated for cartons, plant costs and profits, and delivery costs (Tr. 6399).

the costs and conditions in the Chicago area were different (*e.g.*, in-plant wages: CX 25C, 26), it should have been adjusted. In fact, as A&P admits, the formula was never used to determine the exact measure of a dairy's cost but only to serve as a "workable rule of thumb." (Appeal at 49). Reliance on such a formula would be very irrational in light of all the other evidence (*See* I.D. 98).[30]

[32] Since A&P did not present enough evidence on the issue of knowledge to shift the burden back to complaint counsel, it had to submit a cost justification study if it wished to prevail. The studies entered by A&P on the record (RX 233, 234) were prepared specifically for purposes of this litigation.[31]

We affirm Judge Hinkes' findings (I.D. 136-165) that A&P's cost justification studies "are so defective and inadequate as to furnish no evidentiary basis" to justify the price differential that A&P received for private label products on the basis of Borden's cost savings (I.D. 165). Because the studies are so flawed, we would not find them persuasive under any reasonable standard. However, as we have stated, generally a buyer's cost justification study should meet the same standard that a seller's must. On the other hand, a buyer need not submit any study if complaint counsel fail to prove that the buyer knew or could

---

[30] A&P's other arguments—for example, that A&P could get better prices on private labels in other parts of the country (Tr. 7326)—also do not adequately rebut complaint counsel's strong showing.

[31] Because we do not find the studies sufficiently reliable, we did not decide whether Borden's internal cost calculations (CX 54, 87, 206) are accurate. If A&P's studies adequately showed some type of cost justification, the Borden studies would have been considered as complaint counsel's rebuttal. Accordingly, we did not ascertain whether the A&P study (RX 232) which was offered to rebut Borden's internal cost calculations is accurate.

be charged with knowledge that the prices were not cost justified. *See* [33] *Automatic Canteen Co.* v. *FTC, supra,* 346 U.S. at 74.[32] We note in passing that we would be willing to lower the standard if it was demonstrated that the buyer could not obtain the necessary records from the seller to undertake the study. *See id.* at 79, 81. A&P alleges that hostility existed between Borden and itself (Appeal at 15-16; A&P's Proposed Findings at 8-9) but does not confirm that these "inherent conflicts" prevented it from obtaining records from Borden. In fact, the record shows that A&P was able to get the documents it needed.

* * *

For all of these reasons, we find that the cost justification studies are inadequate to shift the burden back to complaint counsel. Therefore, we find that A&P did not prove that the differential it received was cost justified.

* * *

FINAL ORDER

[1] This matter having been heard by the Commission upon the appeal of The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P") from that portion of the initial decision dealing with Counts I and II, and upon the appeal of complaint counsel from that portion of the initial decision concerning Count III; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission for reasons stated in the accompanying opinion, having granted the appeal of A&P concerning

---

[32] Of course, if the seller is joined in the Robinson-Patman action and relies on the cost justification defense, he will submit the cost justification study.

Count I but otherwise denying the appeals of A&P and complaint counsel; accordingly

[2] *It is ordered,* That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter; and

It is further ordered, That the following order be, and it hereby is, entered:

ORDER

It is ordered, That A&P, a corporation, and its officers, representatives, agents, and employees, directly or through the use of any other device in connection with the offering to purchase or purchase of milk and other dairy products in commerce, as "commerce" is defined in the Robinson-Patman Act, for resale in outlets operated by A&P, do forthwith cease and desist from directly or indirectly inducing, receiving, or accepting from any seller a net price that A&P knows or has reason to know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers with whom A&P is competing; *provided, however,* that this prohibition shall not apply if A&P did not know and had no reason to know that the price difference in its favor did not make due allowance for cost differences resulting from differing methods or quantities in which such products are sold or delivered to such purchasers, or if A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price, which [3] price A&P reasonably believed to be lawful. For the purpose of determining the "net price" under the terms of this order, there shall be

taken into account all discounts and other terms and conditions of sale.

It is further ordered, That A&P shall forthwith distribute a copy of this order to its operating divisions and to its suppliers of milk and other dairy products.

It is further ordered, That A&P notify the Commission at least thirty days prior to any proposed change in A&P's structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect compliance obligations arising under this order.

It is further ordered, That A&P shall, within sixty (60) days after the effective date of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.

APPENDIX D

Statutory Provisions

1. Section 2(a) of the Clayton Act, as amended, 15 U.S.C. § 13(a), provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on ac-

count thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

2. Section 2(b) of the Clayton Act, as amended, 15 U.S.C. § 13(b), provides:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an

equally low price of a competitor, or the services or facilities furnished by a competitor."

3. Section 2(f) of the Clayton Act, as amended, 15 U.S.C. § 13(f), provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

4. Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), provides:

> "(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

GOLDNER PRESS, INC. LAW AND FINANCIAL PRINTERS WO 6-5525